Supreme Court, U.S.
FILED

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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

EVELYN J. WOOD AND ERIK C. MOEBIUS,

Petitioners,

v.

MICHAEL A. WASH AND NATIONWIDE INSURANCE COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Evelyn J. Wood and
Erik C. Moebius

61 pp

QUESTIONS PRESENTED

This is an appeal from rulings in a bankruptcy case. Petitioners, who are husband and wife, filed a Chapter 7 Bankruptcy Petition. Respondents filed adversary pleadings and motions for summary judgment asserting the non-dischargeability of monetary sanctions which had been imposed on Petitioner Erik C. Moebius. Those sanctions had been imposed in a pre-bankruptcy case in Federal District Court pursuant to Rule 11, Federal Rules of Civil Procedure, for filing pleadings without making reasonable inquiry. Respondents asserted that the sanction debts were not dischargeable in bankruptcy as being the legal equivalent of a "willful and malicious injury to the ... property" of the Respondents within the meaning of 11 U.S.C. § 523(a)(6). Petitioners timely filed responses to the motions for summary judgments together with affidavits and court documents. The Bankruptcy Court expressly ignored the summary judgment evidence and granted summary judgment in favor Respondents on the theory that Petitioners were collaterally estopped to deny that Petitioner Moebius had done a "willful and malicious injury" because the pre-bankruptcy court had, in another summary judgment, imposed Rule 11 sanctions. The United States District Court and the United States Court of appeals affirmed. The following questions are presented in this Petition:

1. Whether the Court of Appeals affirmance of a judgment of the District Court which in turn affirmed the summary judgment of the Bankruptcy Court had the effect of erroneously expanding the Congressionally specified exceptions to discharge under 11 U.S.C. § 523(a)(6) by ruling that as a matter of law the pre-bankruptcy court finding of a violation of Rule 11, Federal Rules of Civil Procedure, is legally the equivalent of a "willful and malicious injury to the ... property of another entity"?

2. Whether the courts below erred in summary judgment procedure under Rule 56, Federal Rules of Civil Procedure, in

that the District Court expressly ruled that the bankruptcy court properly ignored Petitioners' summary judgment evidence?

3. Whether the courts below erred in applying the doctrine of collateral estoppel by holding that as a matter of law a pre-bankruptcy court finding of a violation of Rule 11 (failure to make "reasonable inquiry" before signing pleadings) is legally identical to doing a "willful and malicious injury to the ... property of another entity" within the meaning of 11 U.S.C. § 523(a)(6)?

4. Whether the courts below erred in affirming a summary judgment contrary to the only published Court of Appeals opinion in point which held that a trial on the merits was required to determine the question of non-dischargeability of pre-bankruptcy court sanctions? In re Wrenn; American Cast Iron Pipe Company v. Wrenn, 791 F.2d 1542 (U.S. Ct. App., 11th Cir. 1986).

PARTIES BELOW

All of the parties who participated below are set out in the caption.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95____

EVELYN J. WOOD AND ERIK C. MOEBIUS,
Petitioners,

v.

MICHAEL A. WASH AND NATIONWIDE INSURANCE COMPANY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Evelyn J. Wood and Erik C. Moebius respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case on June 9, 1995.

REPORT OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was not published [App. A & B, pp. 1a-4a]. The decision of the United States District Court for the Western District of Texas, Austin Division, was not published [App. C

& D, pp. 5a-11a]. The opinion of the Bankruptcy Court for the Western District of Texas was published at In re Wood, 167 B.R. 83 (Bankr. W.D. Tex. 1994) [App. F & G, pp.13a-26a].

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY AND RULES PROVISIONS INVOLVED

11 U.S.C. Section 523(a)...paragraph (6) thereof:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt - ...
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

Rule 56, Federal Rules of Civil Procedure:

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof....
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the mov

ing party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages....

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse a party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, but set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

Petitioners filed a Chapter 7 and Bankruptcy Petition. Respondents filed adversary proceedings and motions for summary judgment asserting that monetary sanctions imposed on one of the Petitioners in a pre-bankruptcy case in Federal District Court pursuant to Rule 11 for filing pleadings without making reasonable inquiry were not dischargeable in bankruptcy as being the legal equivalent of a "willful and malicious injury to the ... property" of the Respondents. Petitioners timely filed responses together with affidavits and court documents showing the absence of any "willful or malicious injury". The Bankruptcy Court expressly ignored Petitioners'

summary judgment evidence and granted summary judgment in favor Respondents on the theory that Petitioners were collaterally estopped to deny that a Petitioner had done a "willful and malicious injury" because the pre-bankruptcy court had, in another summary judgment, imposed Rule 11 sanctions on Petitioner Moebius. Successive appeals to the United States District Court and the United States Court of Appeals resulted in affirmance of the Bankruptcy Court judgment that the pre-bankruptcy sanctions were non-dischargeable debts.

REASONS THE WRIT SHOULD BE GRANTED

I. **THE COURT OF APPEALS DECISION IS DIRECTLY CONTRARY TO THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME POINT (THE ONLY PUBLISHED COURT OF APPEALS DECISION IN POINT).**

II. **THE COURTS BELOW EFFECTIVELY EXPANDED THE EXCLUSIVE CONGRESSIONALLY ENUMERATED BASES FOR NON-DISCHARGE OF DEBTS BY ADDING "PRE-BANKRUPTCY COURT SANCTIONS" TO THE LIST.**

III. **THE COURT OF APPEALS DECISION AFFIRMED THE DECISION OF THE DISTRICT COURT WHICH EXPRESSLY STATED THAT IT WAS PROPER FOR THE BANKRUPTCY COURT TO DISREGARD SUMMARY JUDGMENT EVIDENCE AND RELY ON COLLATERAL ESTOPPEL. THIS IS ERRONEOUS BECAUSE THE ISSUES DECIDED IN THE PRE-BANKRUPTCY COURT WERE NOT THE SAME ISSUES WHICH SHOULD HAVE BEEN DECIDED IN THE BANKRUPTCY COURT BY A TRIAL ON THE MERITS.**

IV. PETITIONER MOEBIUS FACES DISBARMENT BY SUMMARY JUDGMENT BASED ON PRIOR SUMMARY JUDGMENT (NON-DISCHARGE OF SANCTIONS), BASED ON A SUMMARY JUDGMENT (IMPOSING SANCTIONS) RESULTING FROM HIS FILING A CIVIL RIGHTS CLAIM ON BEHALF OF A WIDOW AND HER BRAIN-INJURED SON, FATHER OF MINOR CHILDREN, CLAIMING CONSPIRACY INVOLVING JUDICIAL CORRUPTION. CONSPIRACY ALLEGATIONS ARE NOT SUBJECT TO SUMMARY JUDGMENT. POLLACK V. COLUMBIA BROADCASTING SYSTEM, INC., 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962).

The decision below is directly contrary to the only other published decision by a United States Court of Appeals directly in point. In re Wrenn; American Cast Iron Pipe Company v. Wrenn, 791 F.2d 1542 (U.S. Ct.App., 11th Cir. 1986). In the Wrenn case, the Court of Appeals for the Eleventh Circuit reversed a lower court decision which affirmed a summary judgment denying discharge of pre-bankruptcy sanctions. The Eleventh Circuit required that the case be remanded and tried on the merits.

In the instant case, contrary to the holding in Wrenn, the Bankruptcy Court below created a new exception to the law which would require a discharge of a petitioner in bankruptcy; the Bankruptcy Court in effect ruled that if a person is sanctioned in a pre-bankruptcy court for filing pleadings without "making reasonable inquiry" in violation of Rule 11 of the Federal Rules of Civil Procedure, the bankruptcy discharge should be denied by summary judgment, without even considering the summary judgment evidence filed on behalf of the petitioner in bankruptcy. This is an impermissible court-made expansion of the exceptions to the right to a discharge in bankruptcy. Congress specifically mandated in 11 U.S.C. § 523 only certain enumerated exceptions to a discharge in bankruptcy, and violation of Rule 11 is not one of those exceptions

so enumerated.

The decisions below also improperly apply Rule 56 of the Federal Rules of Civil Procedure which requires that the court consider summary judgment evidence properly submitted to determine whether or not a material issue of fact has been raised. The District Court below expressly found and approved the Bankruptcy Court's ignoring the summary judgment evidence submitted by the petitioners in bankruptcy. It was ignored because of the Bankruptcy Court's erroneous belief that collateral estoppel precluded Petitioner in bankruptcy court from denying that Petitioner Moebius had committed a "willful and malicious injury to the ... property" of his adversary, which is a ground for denial of discharge in bankruptcy. However, the doctrine of collateral estoppel was improperly applied because fundamental to that doctrine is that the issue previously decided must be an identical issue to the one presently under consideration. Previously decided in the pre-bankruptcy court was that one of the Petitioners had violated Rule 11 of the Federal Rules of Civil Procedure by failing to make "reasonable inquiry" before signing certain pleadings. Clearly, a "failure to make reasonable inquiry" is not the legal equivalent of a "willful and malicious injury" thereby making it unnecessary to consider summary judgment evidence. So holds Wrenn.

As a consequence of his representation of a widow, her brain-injured son, and his minor children, in a pre-bankruptcy suit alleging conspiracy and judicial corruption, Petitioner Moebius was sanctioned in the federal case in a summary judgment proceeding. There was no trial. This holding is contrary to the rule announced in Pollack v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962), that conspiracy allegations are not subject to disposition by summary judgment. Thereafter, in the bankruptcy case, the sanctions were adjudged to be non-dischargeable by summary judgment. There was no trial. Currently, Petitioner

Moebius is facing disbarment by summary judgment (no trial) because of his having alleged conspiracy and judicial corruption. At some point, there should be a trial at least to determine whether Petitioner Moebius was justified in alleging judicial corruption, or at least by doing so was not guilty of a "willful and malicious injury" to the attorney and the insurance company who were adverse to his clients. Instead of investigating the evidence of judicial corruption, the State Bar of Texas is seeking to disbar Petitioner Moebius by means of a no-trial disbarment proceeding. Therefore, aside from the importance to the jurisprudence related to dischargeability of pre-bankruptcy sanctions, this Honorable Court should grant this petition for a writ of certiorari because of its importance to the purity of the judiciary. A whistleblower should not suffer three consecutive summary judgments, the second two based on collateral estoppel based on the first one which was contrary to the holding in the Pollack case. The lesson such a result would teach attorneys and litigants is to suffer apparent judicial corruption in silence for to do otherwise subjects one to permanent financial ruin and loss of professional license.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be granted to review and thereafter reverse the judgment and the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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EVELYN J. WOOD AND
ERIK C. MOEBIUS

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APPENDIX A

[Filed June 9, 1995]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 95-50038
Summary Calendar

In re EVELYN J. WOOD, and ERIK C. MOEBIUS, Debtors.

MICHAEL A. WASH, and NATIONWIDE INSURANCE COMPANY,

Appellees,

versus

EVELYN J. WOOD, and ERIK C. MOEBIUS,

Appellants.

Appeal from the United States District Court
for the Western District of Texas
(94-CV-594)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

The judgment of the district court affirming the bankruptcy court's summary judgment in favor of Michael A. Wash and Nationwide Insurance Company is AFFIRMED for the reasons given by the district court in its order and opinion of December 2, 1994.

---

* Local Rule 47.5 provides:
"The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."
Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX B

[Filed June 9, 1995]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50038
Summary Calendar

D.C. Docket No. 94-CV-594

IN RE EVELYN J. WOOD, AND ERIK C. MOEBIUS,

Debtors.

MICHAEL A. WASH, AND
NATIONWIDE INSURANCE COMPANY,

Appellees,

versus

EVELYN J. WOOD, AND ERIK C. MOEBIUS,

Appellants.

Appeal from the United States District Court for the Western District of Texas

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District

Court in this cause is affirmed.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

June 9, 1995

ISSUED AS MANDATE: Jul 3 1995

APPENDIX C

[Filed Dec. 2, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EVELYN J. WOOD and
ERIK C. MOEBIUS

v. Civil No.: A-94-CA-594-SS

NATIONWIDE INSURANCE COMPANY
and MICHAEL A. WASH

JUDGMENT IN A CIVIL CASE

This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS THEREFORE ORDERED that judgment of the United States Bankruptcy Judge Frank Monroe on April 7, 1994, in entering summary judgment in favor of Michael A. Wash in the amount of $15,403.00 and Nationwide Insurance Company in the amount of $38,994.00 is affirmed and further these debts of Erik C. Moebius are nondischargeable pursuant to 11 U.S.C. 523(a)(6).

IT IS FURTHER ORDERED that all costs are taxed to Appellants Erik C. Moebius and Evelyn J. Wood, for which let execution issue.

Date: December 2, 1994 WILLIAM G. PUTNICKI, CLERK
Western District of Texas

By: /s/ Tencha Damian
Deputy

APPENDIX D

[Filed Dec. 2, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EVELYN J. WOOD and	§	
ERIK C. MOEBIUS	§	
	§	
vs.	§	NO. A 94 CA 594 SS
	§	
NATIONWIDE	§	
INSURANCE COMPANY	§	
and MICHAEL A. WASH	§	

ORDER

BE IT REMEMBERED on this the 2nd day of December 1994 the Court reviewed the file in the above-captioned matter and determined that the issues involved in this bankruptcy appeal were purely legal issues and, after a de novo review of the issues presented, enters the following findings and order:

The Debtor Erik C. Moebius is, or was, a licensed attorney in the State of Texas who has been permitted to practice in the United States District Court for the Western District of Texas. On June 28, 1993, in cause #SA-92-CA-566, Abelia Garcia, et al. v. Michael A. Wash, et al., the Honorable Edward Prado, United States District Judge for the Western District of Texas in the San Antonio Division, entered a judgment, including a judgment of sanctions, against Erik C. Moebius in favor of Michael A. Wash in the amount of $15,403.00 and Nationwide Insurance Company in the amount of $38,944.00. Previously, on May 24, 1993, Judge Prado had adopted the factual determinations in the case in a report and recommendation from the United States Magistrate Judge Robert O'Connor, the Magistrate Judge's report being filed of record in the same cause on March 18, 1993.

The judgment of June 28, 1993, entered by Judge Prado, including the sanctions, was affirmed by the United States Court of Appeals for the Fifth Circuit on April 27, 1994. The appellate court specifically affirmed the sanctions, both factually and in amount. Thus, Judge Prado's judgment of June 28, 1993, explicitly incorporating the findings of fact made by United States Magistrate Judge in his order of March 18, 1993, is a final judgment.

Subsequent to the entry of judgment of liability on the sanctions, Erik C. Moebius and his wife, Evelyn J. Wood, filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code. In an adversary proceeding, Michael A. Wash and Nationwide Insurance Company filed claims and contended the sanctions awarded in the San Antonio federal lawsuit were nondischargeable liabilities under 11 U.S.C. § 523(a)(6). On April 7, 1994, United States Bankruptcy Judge Frank Monroe entered summary judgment in favor of Michael A. Wash and Nationwide Insurance Company expressly holding, as a matter of law, that the sanctions liabilities were nondischargeable under 11 U.S.C. § 523(a)(6) and that collateral estoppel established both the nature of the sanctions liabilities (that is, the facts justifying the sanctions) as well as the amount of the sanctions.[1] On July 5, 1994, United States Bankruptcy Judge Frank Monroe denied reconsideration of his ruling of March 7, 1994, and a notice of appeal was filed on behalf of the debtors, Evelyn J. Wood and Erik C. Moebius, on July 21, 1994. Ultimately, with the resolution of all other issues in the bankruptcy case, this appeal was timely made.

Thus, the issues to be determined in this appeal are rather simple even though the facts and history of this litigation are extremely complex. Does the doctrine of collateral estoppel permit the United States Bankruptcy Judge to determine, as a

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1 A trial court's judgment may be applied for purposes of collateral estoppel even while on appeal. See Huron Holding Corp. v. Lincoln Mine Operating Co., 61 S. Ct. 513, 515 (1941).

matter of law, the factual basis of the sanctions and enter judgment by way of summary judgment in favor of creditors Wash and Nationwide Insurance Company? This Court believes that Judge Monroe was correct and that the summary judgment awarded on April 7, 1994, should be in all things affirmed.

Under 11 U.S.C. § 523(a)(6), a debt is non-dischargeable when it is a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." The Fifth Circuit has held that under § 523(a)(6) "[w]illful means intentional and malicious adds the absence of just cause or excuse." Seven Elves, Inc. v. Eskanazi, 704 F.2d 241, 245 (5th Cir. 1983).

The history of the litigation of the case in the San Antonio Division of the United States District Court for the Western District of Texas is excruciatingly set out in Judge O'Connor's memorandum filed April 18, 1994, with its findings of fact and recommendations exceeding 100 pages in length. The factual determinations made in this memorandum were reviewed, de novo, by United States District Judge Edward Prado and ultimately served as the basis for his ruling on the sanctions, which ruling was affirmed by the United States Court of Appeals. Any reading of Judge O'Connor's memorandum clearly establishes that the conduct of Erik C. Moebius as a lawyer in the San Antonio case was intentional and without just cause and clearly serves as the basis for a "willful and malicious injury . . . to another . . . or the property of another . . ." as required by 11 U.S.C. § 523(a)(6) for nondischargeability. For example, on page 85 of the United States Magistrate Judge's factual findings, the Magistrate Judge summed up the specific factual findings made by stating, "This Court can only conclude that Plaintiffs' counsel filed Plaintiffs' federal civil rights conspiracy claims against the private defendants with full knowledge of, or wanton and reckless disregard for, the absence of any facts to support same and for the purpose of harassing those defendants with having to defend themselves in yet another forum . . . The record in this case indicates an abuse of the legal process by Plaintiffs' counsel . . . ." the pleadings

in question were amended pleadings after eight months of legal maneuvering and supervision by the United States Magistrate Judge over the case which contains such gross (and totally unsubstantiated allegations) that the Magistrate Judge described them on page 87 of his opinion by stating, "Seldom, if ever, before has this Court been witness to a civil lawsuit in which a party has asserted more unsubstantiated, scurrilous allegations of perfidy on the part of a group defendants than has been presented by Plaintiffs herein in their Second Amended Petition . . . ."

These factual determinations were contested in the United States District Court by the debtor Moebius. Notwithstanding, the sanctions and the factual basis were affirmed in the United States Court of Appeals. The doctrine of collateral estoppel in the bankruptcy context is clearly applicable. See Matter of Shuler, 722 F.2d 1253, 1256 (5th Cir. 1984); Seven Elves, Inc., 704 F.2d at 243-244. As a matter of law, the factual determinations made in the federal court case in San Antonio are binding on Moebius in the bankruptcy case.

For the doctrine of collateral estoppel to apply there must be an identity of facts, the issue must have been actually litigated in the prior action, and the determination of the issue must have been necessary for the judgment. See Seven Elves, Inc., 704 F.2d at 244. The identity of facts element, although discussed at length by appellants, is relatively simple: Did the United States District Court make a factual determination that the actions of appellant were willful and malicious? The factual determinations adopted by the District Court, including those previously quoted, support the Bankruptcy Court's determination that there is an identity of issues. The District Court's failure to use the words "willful and malicious" is not determinative, rather the Court must look to the factual issue previously determined. The issue determined by the District Court was that Moebius's conduct was intentional and without just cause, warranting sanctions under Rule 11.

The second and third elements necessary for collateral estoppel have also been satisfied. A determination based on summary judgment evidence before a court is sufficient to establish that the issues were litigated. See Exhibitors Poster Exchange v. National Screen Service Corporation, 421 F.2d 1313, 1319 (5th Cir. 1970). Further, the determination regarding Moebius's conduct was necessary for the determination of the Rule 11 sanctions imposed. Moebius's argument that the findings were unnecessary because less abusive conduct may justify Rule 11 sanctions is without merit. A determination of Moebius's conduct was necessary for the imposition of sanctions.

Moebius's conduct created the debt here at issue. The subsidiary facts supporting the debt have been litigated and decided. Therefore, it is appropriate and necessary for the bankruptcy judge to rule on the ultimate issue of dischargeability under 11 U.S.C. § 523(a)(6) at the summary judgment state. See Matter of Shuler, 722 F.2d at 1255. There can be no bona fide contention that Moebius' conduct as previously determined was not intended to be "willful and malicious injury . . . to another . . . or the property of another . . . ."[2]

Because the Court finds that the Bankruptcy Court was proper in applying collateral estoppel to the determination of the factual issues of 11 U.S.C. § 523(a)(6), the Court correspondingly finds that it was proper to ignore the summary judgment evidence presented by Moebius in support of his conduct.

IT IS THEREFORE ORDERED that the judgment of the United States Bankruptcy Judge Frank Monroe of

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2 Although not necessary for the Court's determination of this matter, the Court notes that Moebius was a lawyer authorized to practice in the federal court and any other ruling would obviate a legal education, knowledge of the federal rules, and the engagement of the ethical practice of law. Moebius' conduct is clearly the type of conduct that establishes a nondischargeable liability, just as any lawyer whose intentional conduct invokes such a sanction cannot discharge it in bankruptcy.

April 7, 1994, in entering summary judgment in favor of Michael A. Wash in the amount of $15,403.00 and Nationwide Insurance Company in the amount of $38,994.00 is affirmed and further these debts of Erik C. Moebius are nondischargeable pursuant to 11 U.S.C. 523(a)(6).

IT IS FURTHER ORDERED that all costs are taxed to Appellants Erik C. Moebius and Evelyn J. Wood for which let execution issue.

SIGNED this the 2nd day of December, 1994.

/s/ Sam Sparks
UNITED STATES DISTRICT JUDGE

APPENDIX E

[Filed Aug. 10, 1994]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	§	
EVELYN J. WOOD AND	§	Case No. 93-12067-FM
ERIK C. MOEBIUS,	§	Chapter 7
	§	
DEBTORS	§	
	§	
	§	
MICHAEL A. WASH	§	Adversary No. 93-1330FM
	§	93-1327FM
v.	§	
	§	
EVELYN J. WOOD	§	

ORDER GRANTING CONSOLIDATION OF APPEALS

Came on to be considered Defendant's Motion to Consolidate Appeals. The Court is of the opinion that said motion is meritorious and should be in all things granted.

It is therefore ORDERED that Defendant's Motion to Consolidate Appeals is GRANTED. It is further ORDERED that the appeal of adversary numbers 93-1327-FM and 93-1330-FM are consolidated for all purposes under Adversary Proceeding Number 93-1330-FM.

Aug. 10, 1994.

/s/ F.R. Monroe
FRANK MONROE
BANKRUPTCY JUDGE
PRESIDING

APPENDIX F

[Filed Apr. 8, 1994]

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	)	
	)	
EVELYN J. WOOD AND	)	CASE NO. 93-12067-FM
ERIK C. MOEBIUS,	)	(Chapter 7)
	)	
DEBTORS	)	
	)	
MICHAEL A. WASH	)	
PLAINTIFF	)	
v.	)	ADVERSARY NO. 93-1330FM
	)	
ERIK C. MOEBIUS	)	
DEFENDANT	)	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Court held a hearing on Plaintiff's Motion for Summary Judgment on March 23, 1994 in the above referenced adversary proceeding. Findings of Fact and Conclusions of Law pursuant to Bankruptcy Rule 7056 are contained in a Memorandum Opinion of even date herewith. Based thereon, it is

ORDERED that Plaintiff's Motion for Summary Judgment be, and the same is hereby, denied insofar as it seeks relief under 11 U.S.C. § 523(a)(7); it is further

ORDERED that Plaintiff's Motion for Summary Judgment be, and the same is hereby, granted insofar as it seeks relief under 11 U.S.C. § 523 (a)(6); and it is further

ORDERED that the Amended Judgment entered in Civil Action No. SA-92-CA-0566 styled Abelia Garcia, et al v. Michael A. Wash, et al, in the United States District Court for the Western District of Texas, San Antonio Division, which grants a judgment against the Debtor and Defendant herein, Erik C. Moebius, in favor of the Plaintiff herein, Michael A. Wash, in the amount of $15,403.62, plus interest thereon and other costs as allowed therein be, and the same is hereby, determined to be nondischargeable and, therefore, unaffected by the Order of Discharge entered in the main case.

DATED: April 7, 1994.

/s/ F.R. Monroe
FRANK R. MONROE
United States Bankruptcy Judge

APPENDIX G

[Filed Apr. 8, 1994]

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	)	
	)	
EVELYN J. WOOD AND	)	CASE NO. 93-12067-FM
ERIK C. MOEBIUS,	)	(Chapter 7)
	)	
DEBTORS	)	
	)	
MICHAEL A. WASH	)	
PLAINTIFF	)	
v.	)	ADVERSARY NO. 93-1330FM
	)	
ERIK C. MOEBIUS	)	
DEFENDANT	)	

MEMORANDUM OPINION PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Court held a hearing on Plaintiff's Motion for Summary Judgment on March 23, 1994. The Court has considered pleadings of the parties, the competent summary judgment evidence, the argument of counsel, and the legal authorities cited to the Court by the parties. Based thereon, the Court enters this Memorandum Opinion as a statement of those material facts which are not in genuine dispute and the conclusions of law upon which the Court's ruling is based.

Material Facts Not in Genuine Dispute

On June 28, 1993, there was filed in Civil Action No. SA-92-CA-0566 styled Abelia Garcia, et al v. Michael A. Wash, et al, ("Prior Action") an Amended Judgment rendered by the Hon-

orable Edward C. Prado, United States District Judge for the Western District of Texas, San Antonio Division which granted the Motion for Sanctions filed by Michael A. Wash, the Plaintiff herein, pursuant to Rule 11 of the Federal Rules of Civil Procedure and assessed against the Plaintiff's counsel therein, Erik C. Moebius, sanctions in the amount of $15,403.62. That Judgment amended the prior Judgment entered on May 24, 1993. The Amended Judgment was entered pursuant to the Memorandum and Recommendation of the Honorable Robert B. O'Connor, United States Magistrate, filed in such case on March 18, 1993 which was accepted by Judge Prado by Order Accepting Magistrate's Recommendations filed May 24, 1993.

The Memorandum and Recommendation of the United States Magistrate is 114 pages in length. It speaks not only to the Motion for Sanctions filed by Wash but also to Motions for Summary Judgment and Motions for Sanctions filed by all Defendants therein. It is an exhaustive and thorough report which recommends to the district judge many findings of fact and conclusions of law with regard to the matters which were actually tried before him pursuant to the Order dated November 18, 1992 entered by Judge Prado in such proceeding referring all pretrial matters to Judge O'Connor.

The Plaintiff relies upon those recommended findings which were accepted by Judge Prado to support his Motion for Summary Judgment here. The findings of fact most relevant to this case are the following:

1. that "...plaintiffs' counsel [Moebius] filed plaintiffs' federal civil rights claims against the private defendants [including Wash] without having first conducted a reasonable inquiry into the factual bases for those claims." See Exhibit P-1, pp.84-85, attached to Plaintiff Michael A. Wash's Motion for Summary Judgment;

2. that "...plaintiffs' counsel filed plaintiffs' federal civil rights conspiracy claims against the private defendants

with full knowledge of, or wanton and reckless disregard for, the absence of any facts to support same and for the purpose of harassing those defendants with having to defend themselves in yet another forum." See Exhibit P-1, p.85, attached to Plaintiff Michael A. Wash's Motion for Summary Judgment;

3. that "plaintiffs' counsel filed plaintiffs' original, first amended, and second amended pleadings in this lawsuit without having first made a reasonable inquiry into the factual basis for plaintiffs' federal civil rights claims against the private defendants and for the purpose of harassing the private defendants and increasing those defendants' costs of litigation." See Exhibit P-1, p.85, attached to Plaintiff Michael A. Wash's Motion for Summary Judgment;

4. that the record in the case "...demonstrates an abuse of the legal process by plaintiffs' counsel in the filing of plaintiffs' civil rights claims against the private defendants." See Exhibit P-1, p.85, attached to Plaintiff Michael A. Wash's Motion for Summary Judgment; and

5. that "plaintiffs' claims against the private defendants were, and are, (1) based neither on existing law nor a good faith argument for the extension, modification or reversal of existing law, (2) based upon inadequate legal support, and (3) motivated by improper purpose." See Exhibit P-1, pp. 86-87, attached to Plaintiff Michael A. Wash's Motion for Summary Judgment.

Although not restated herein in full due to the length of the documents, this Court incorporates by reference herein all of the findings of fact proposed by Judge O'Connor in his Memorandum and Recommendation and accepted by Judge Prado insofar as they relate to Wash's Motion for Sanctions which was one of the pending motions determined thereby.

Issues

1. Applicability of collateral estoppel?

2. Do the subsidiary facts determined in the Prior Action compel a determination of nondischargeability of the Rule 11 sanctions awarded to the Plaintiff against the Defendant in the Prior Action under § 523(a)(6)?

3. Under § 523(a)(7)?

Conclusions of Law and Analysis

1. Collateral Estoppel. Clearly the doctrine of collateral estoppel may be applied in dischargeability actions. Matter of Shuler, 722 F.2d 1253 (5th Cir. 1984), cert. denied, 469 U.S. 817 (1984). In order to determine whether to apply collateral estoppel in any particular case, the Bankruptcy Court must have before it sufficient portions of the prior record in order to be able to determine that the subsidiary facts were actually litigated and necessarily determined by the prior court. In re Nix, 92 B.R. 164 (Bankr. N.D. Tex. 1988). "If the prior record sufficiently established the subsidiary facts on which the judgment was based, the court then independently determines whether these subsidiary facts establish the elements of nondischargeability as defined by federal bankruptcy law." Id.

In the present case, we have before us the very detailed and complete 114-page Memorandum and Recommendation of the United States Magistrate, the 17-page Order Accepting Magistrate's Recommendations of the District Judge, and the ultimate Amended Judgment. An examination of these documents clearly reveals very detailed subsidiary facts which were found by that Court, which support that Court's ultimate ruling in the Prior Action, and which were viewed by it as necessary to its ruling. These factual findings are in sufficient detail that this Court can determine whether they also establish the independent elements of nondischargeability under the § 523(a)

causes of action which are at issue in this adversary proceeding.

Further, "Collateral estoppel may be applied to a trial court finding even while the judgment is pending on appeal." In re Nix, supra at p. 167, citing Southern Pacific Communications Co. v. American Telephone & Telegraph, 740 F.2d 1011 (D.C. Cir. 1984). In this case, Moebius alleges that he effectively appealed Judge Prado's Amended Order. Plaintiff disputes that. Regardless, the existence of an appeal does not prevent the rendering of a decision in this matter.

2. Nondischargeability Under § 523(a)(6). In order to apply collateral estoppel in this case, the factual issues under §523(a)(6) sought to be precluded must be identical to those determined in the prior action, they must have been actually litigated, and the determination of these issues must have been necessary to the resulting judgment. Shuler, supra. at p. 1256, n. 2 [citing White v. World Finance of Meridian, Inc., 653 F.2d 147, 151 (5th Cir. 1981)].

The issue in the Prior Action was whether Moebius violated Rule 11 of the Federal Rules of Civil Procedure which provides in relevant part as follows:

> The signature of an attorney ... constitutes a certificate by the signer that the signer has read the pleading ...; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass ...". Rule 11 F.R.C.P.

The District Court found among other things (1) that Moebius had filed his client's federal civil rights claims against Wash without having first conducted reasonable inquiry into the factual basis of those claims and with full knowledge of, or

wanton and reckless disregard to, the absence of any facts to support the same and for the purpose of harassing those defendants with having to defend themselves in yet another forum, (2) that Moebius filed plaintiffs' original, first amended, and second amended pleadings in this lawsuit without having first made a reasonable inquiry into the factual basis for plaintiffs' federal civil rights claims against the private defendants and for the purpose of harassing the private defendants and increasing the defendants' cost of litigation, (3) that the record demonstrates an abuse of the legal process by plaintiffs' counsel in the filing of plaintiffs' federal civil rights claims against the private defendants, and (4) that the plaintiffs' claims which were brought by Moebius against Wash were based neither upon existing law nor a good faith argument for the extension, modification, or reversal of existing law, were based upon inadequate legal support, and were motivated by improper purpose.

Also contained as part of Judge O'Connor's recommended findings accepted by Judge Prado is the following:

> Seldom, if ever, before has this Court been witness to a civil lawsuit in which a party has asserted more unsubstantiated, scurrilous allegations of perfidy on the part of a group of defendants that has been presented by plaintiffs herein in their Second Amended Petition [sic]. The plaintiffs allege that the private defendants bribed and conspired with no less than two separate state district court Judges for the purpose of depriving the plaintiffs of fair judicial proceedings. Such allegations necessarily draw into question the integrity of the individual defendants, two of whom are licensed attorneys, the two state court judges with whom the private defendants allegedly conspired, and the judicial process itself. Yet, despite several efforts by this Court to prod the plaintiffs into providing, if not proper summary judgment evidence supporting

> their broad-ranging allegations of corrupt activities on the part of the defendants, then at least fact-specific allegations supporting same, plaintiffs have furnished this Court with not even a scintilla of evidence establishing that any of the private defendants ever bribed or conspired with either of the two state district Judges mentioned plaintiffs' Second Amended Petition [sic]. Innuendo is no substitute for fact; stridency no substitute for evidence. Inferences of a civil rights conspiracy can only be drawn from legally admissible evidence, of which the record in this case is totally devoid. The plaintiffs' counsel's action in filing plaintiffs' Second Amended Petition [sic] in this lawsuit constituted an abuse of the legal process rarely approached in the annals of this Court."

See Memorandum and Recommendation of United States Magistrate, pp.87-88.

After hearing the Plaintiffs objections to the United States Magistrate's Memorandum and Recommendation, Judge Prado overruled those objections and accepted the Recommendation.

So, the District Court in the Prior Action has found as a matter of fact that with regard to the Plaintiff Wash, the Defendant Moebius caused pleadings to be filed "for the purpose of harassing", "without having first conducted a reasonable inquiry into the factual basis of those claims", "with full knowledge of, or wanton and reckless disregard for, the absence of any facts to support the same", which conduct "demonstrates an abuse of legal process by" Moebius and that all of such action was "motivated by improper purpose".

Were the foregoing subsidiary facts actually litigated? There can be no doubt about it. They clearly were litigated, without question.

Were they necessary to be determined for the decision to be rendered in the prior Federal Court matter? Absolutely. The foregoing quoted findings are virtually identical to the provisions of Rule 11 which one must prove in order to establish a violation of that rule.

So the question becomes whether the subsidiary facts found in the prior Federal Court action are identical to those in this action that are required to be proven in order to establish a violation of § 523 (a)(6). The answer is an unqualified "yes, they are."

In the Fifth Circuit "willful" as used in § 523(a)(6) means "intentional" and the term "malicious" means "without just cause or excuse". Seven Elves, Inc. v. Eskenazi, 704 F.2d 241 (5th Cir. 1983).

> "Willful" as used in § 523(a)(6), means deliberate or intentional. "Malicious", as used, means in conscious disregard of one's duties, or without just cause or excuse, and does not require ill will or specific intent to do harm.

Norton v. Dean (In re Dean), 79 B.R. 659, 662 (Bankr. N.D. Tex. 1987).

Do the findings of fact in the Prior Action establish that Moebius' action was intentional? Clearly they do. Moebius, as attorney for the plaintiff in the Prior Action, caused the filing of his client's alleged federal civil rights conspiracy claims as contained in the plaintiff's original, first amended, and second amended pleadings. Moebius' position that the Prior Action fails to establish that he intended to injure Wash is not responsive as the inquiry is not whether there was an "intention to injure" but instead whether the act taken which resulted in the injury was intentional. Here, without question, the Prior Action establishes that Moebius' actions which resulted in the injury to Wash were wilfully taken; that is, he intended to take

the actions he took and those actions resulted in the complained of injury.

Was Moebius' conduct malicious? Neither ill will or specific intent to do harm is required for a finding of malicious to be mandated under § 523 (a)(6). Here the Prior Action has determined that Moebius' action was taken "for the purpose of harassing" Wash among others, that his action was "motivated by an improper purpose", and that it amounted to "an abuse of the legal process". Clearly, those findings are equal to and support a determination in this matter that Moebius' conduct was "without just cause or excuse" or in "conscious disregard of his duties" as a practicing attorney under Rule 11.

The subsidiary facts upon which the Amended Judgment was entered in the Prior Action having been actually litigated, having been necessary to the determination of the resulting judgment therein, and being identical to the facts which Plaintiff herein must prove by a preponderance of the evidence, Defendant is collaterally estopped from re-litigating them. Judgment is mandated for the Plaintiff determining that the Amended Judgment against Moebius in the amount of $15,403.62 entered in the Prior Action in favor of the Plaintiff is not dischargeable.

3. Dischargeability Under § 523(a)(7). To the extent that the Amended Judgment represents "a fine, penalty or forfeiture ... payable to and for the benefit of governmental unit, and is not compensation for actual pecuniary loss, ...", it is nondischargeable. 11 U.S.C. § 523(a)(7).

Clearly, the central purpose of Rule 11 is to deter frivolous lawsuits, Thomas v. Capital Security Services, Inc., 836 F.2d 866, 879 (5th Cir. 1988) (en banc). "Sanctions also insure, to a large degree, that victims of frivolous lawsuits do not pay the expensive legal fees associated with defending such lawsuit ..." Id. citing United Food & Commercial Workers v. Armour and Co., 106 F.R.D. 345, 349 (1985). "However, we would cau-

tion that '[w]hether sanctions are viewed as a form of cost-shifting, compensating opposing parties injured by vexatious or frivolous litigation forbidden by Rule 11, or as a form of punishment imposed on those who violate the Rule, the imposition of sanctions pursuant to Rule 11 is meant to deter attorneys from violating the Rule. Donalson, 815 F.2d at 1556 (emphasis added)." Id. at 877.

This Court has found three different results by courts in applying § 523(a)(7) in cases such as this.

One bankruptcy court, in deciding that Rule 11 sanctions imposed upon a debtor in a Chapter 11 case for actions taken therein are not discharged in the Chapter 7 case to which the debtor converted, stated what seems to be a "per se" rule:

> Can a Rule 9011 sanction be discharged? This court must answer that question with a resounding 'NO'! To allow the offending party to discharge a Rule 9011 sanctions would totally defeat, destroy, and emasculate its purpose.

In re McIntrye, 96 B.R. 70 (Bankr. S.D. Miss. 1989).

Other courts have determined that the "plain meaning" of §523(a)(7) compels a ruling of nondischargeability only if the award is both payable to and for the benefit of a governmental unit. In re Strutz, 154 B.R. 508 (Bankr. N.D.Ind. 1993). In re Ellwanger, 105 B.R. 551, 555-6 (9th Cir. BAP 1989) ("Congress specifically created an exception to discharge for noncompensatory damages. In establishing the exception Congress clearly determined not to allow nongovernmental entities to seek to have penalties and other noncompensatory determined nondischargeable."). Another bankruptcy court determined that costs awarded by the Idaho Supreme Court in favor of the Idaho State Bar in disciplinary proceedings against the debtor/lawyer were nondischargeable under § 523(a)(7) because the Idaho State Bar was a governmental unit. In re

Williams, 158 B.R. 488 (Bankr. D. Idaho 1993). See also In re Corbly, 61 B.R. 851 (Bankr. D.S.D. 1986), on reconsideration, 149 B.R. 125 (Bankr. D.S.D. 1992) (Portion of contempt judgment payable to a municipality which was determined to be a fine payable to and for the benefit of a governmental unit was nondischargeable since it was noncompensatory to nature).

Still other courts have held similar judicial fines or penalties nondischargeable even though payable to a private litigant. In re Winn, 92 B.R. 938 (Bankr. M.D. Fla. 1988) (A contempt judgment payable to the opposing party was determined not to be compensation for actual pecuniary loss, even though civil in nature, and to be for the purpose of vindicating the dignity and authority of the court and, therefore, for the benefit of a governmental unit.). In re Klein, 31 B.R. 947 (Bankr. Colo. 1983) (Contempt fine for failure to deliver children in accordance with custody order was a penalty imposed to uphold the dignity of the court and was noncompensatory in nature; therefore, it was nondischargeable even though payable directly to the opposing party.) In re Marini, 28 B.R. 262 (Bankr. E.D.N.H. 1983) (A fine for violation of a temporary restraining order construed to be primarily to uphold the dignity of the court even though payable directly to the opposing party and therefore nondischargeable.)

The language of § 523(a)(7) is clear and unambiguous. It holds a debt nondischargeable to the extent it is a "fine, penalty, ... payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, ...". (emphasis added). The Supreme Court of the United States has told us bankruptcy judges simply to look at the "plain meaning" of the statute. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989).

As a [sic] least one other bankruptcy court has put it,

> This court must respectfully and reluctantly disagree. Although there are certainly excellent policy

> reasons for the 'totality of the circumstances' inquiry adopted by Marini and its progeny, that type of analysis is demonstrably at odds with the plain meaning of the statute.

In re Strutz, supra at 510. The language of § 523(a)(7) is clear. In order to be nondischargeable the fine or penalty must be "payable to and for the benefit of a governmental unit". Further, it must not be compensatory in nature. In this case, the Rule 11 sanctions are not payable to a governmental unit but to a private litigant. Further, they are clearly compensatory in nature as they represent attorney's fees incurred by Wash in the defense of the frivolous action brought by Moebius. The fact that one of the purposes for which the sanction was awarded was to uphold the dignity of the legal process in federal court as well as the court itself does not allow this Court to dispense with the other stated requirements of § 523(a)(7). Accordingly, the debt in question is dischargeable under § 523(a)(7).

An order of even date with this Memorandum Opinion will be entered pursuant to Rule 59, F.R.C.P.

DATED: April 7, 1994.

/s/
FRANK R. MONROE
United States Bankruptcy Judge

APPENDIX H

[Filed Apr. 8, 1994]

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	)	
	)	
EVELYN J. WOOD AND	)	CASE NO. 93-12067-FM
ERIK C. MOEBIUS,	)	(Chapter 7)
	)	
DEBTORS	)	
	)	
NATIONWIDE	)	
INSURANCE COMPANY	)	
PLAINTIFF	)	
v.	)	ADVERSARY NO. 93-1327-FM
	)	
ERIK C. MOEBIUS	)	
DEFENDANT	)	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court held a hearing on Plaintiff's Motion for Summary Judgment on March 23, 1994 in Adversary No. 93-1330-FM styled Michael A. Wash v. Erik C. Moebius. At the conclusion of the hearing, counsel for Erik C. Moebius and counsel for Nationwide Insurance Company, who had attended the hearing on Wash's Motion for Summary Judgment in Adversary No. 93-1330-FM, both waived oral argument with regard to Nationwide Insurance Company's Motion for Summary Judgment filed herein since the issues are identical to that which the Court heard oral argument upon in the Wash adversary proceeding. Findings of Fact and Conclusions of Law pursuant to Bankruptcy Rule 7056 are contained in a Memorandum

Opinion of even date herewith. Based thereon, it is

ORDERED that Plaintiff's Motion for Partial Summary Judgment be, and the same is hereby, denied insofar as it seeks relief under 11 U.S.C. § 523(a)(7); it is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment be, and the same is hereby, granted insofar as it seeks relief under 11 U.S.C. § 523(a)(6); and it is further

ORDERED that the Amended Judgment entered in Civil Action No. SA-92-CA-0566 styled Abelia Garcia, et al v. Michael A. Wash, et al, in the United States District Court for the Western District of Texas, San Antonio Division, which grants a judgment against the Debtor and Defendant herein, Erik C. Moebius, in favor of the Plaintiff herein, Nationwide Insurance Company, in the amount of $38,994.87, plus interest thereon and other costs as allowed therein be, and the same is hereby, determined to be nondischargeable and, therefore, unaffected by the Order of Discharge entered in the main case.

DATE: April 7, 1994.

/s/ F.R. Monroe
FRANK R. MONROE
United States Bankruptcy Judge

APPENDIX I

[Filed Apr. 15, 1994]

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	)	
	)	
EVELYN J. WOOD AND	)	CASE NO. 93-12067-FM
ERIK C. MOEBIUS,	)	(Chapter 7)
	)	
DEBTORS	)	
	)	
NATIONWIDE	)	
INSURANCE COMPANY	)	
PLAINTIFF	)	
v.	)	ADVERSARY NO. 93-1327-FM
	)	
ERIK C. MOEBIUS	)	
DEFENDANT	)	

ORDER AMENDING MEMORANDUM OPINION
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

The Court issued its Memorandum Opinion Plaintiff's Motion for Summary Judgment in the above entitled and numbered adversary proceeding on April 8, 1994. A clerical error was made on page 10, line 22. The amount of the judgment was stated as $15,403.62. It should have been $38,994.87. It is accordingly

ORDERED that the dollar amount of $15,403.62 contained in line 22 of page 10 of the Court's Memorandum Opinion Plaintiff's Motion for Partial Summary Judgment be, and the same is hereby, deleted therefrom and the dollar amount of $38,994.87 be, and the same is hereby, substituted in its stead.

DATED: April 14, 1994. /s/ F.R. Monroe
FRANK R. MONROE
United States Bankruptcy Judge

APPENDIX J

[Filed Apr. 8, 1994]

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	)	
	)	
EVELYN J. WOOD AND	)	CASE NO. 93-12067-FM
ERIK C. MOEBIUS,	)	(Chapter 7)
	)	
DEBTORS	)	
	)	
NATIONWIDE	)	
INSURANCE COMPANY	)	
PLAINTIFF	)	
v.	)	ADVERSARY NO. 93-1327-FM
	)	
ERIK C. MOEBIUS	)	
DEFENDANT	)	

MEMORANDUM OPINION PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court held a hearing on Plaintiff's Motion for Summary Judgment on March 23, 1994 in Adversary No. 93-1330-FM styled Michael A. Wash v. Erik C. Moebius. At the conclusion of that hearing, counsel for Erik C. Moebius and counsel for Nationwide Insurance Company, who had attended the hearing on Wash's Motion for Summary Judgment in Adversary No. 93-1330-FM, both waived oral argument with regard to Nationwide Insurance Company's Motion for Summary Judgment filed herein since the issues are identical to that which the Court heard oral argument upon in the Wash adversary proceeding. Based upon that submission, and without oral argument, the Court has considered pleadings of the parties, the competent summary judgment evidence, and the legal

authorities cited to the Court by the parties. Based thereon, the Court enters this Memorandum Opinion as a statement of those material facts which are not in genuine dispute and the conclusions of law upon which the Court's ruling is based.

Material Facts Not in Genuine Dispute

On June 28, 1993, there was filed in Civil Action No. SA-92-CA-0566 styled Abelia Garcia, et al v. Michael A. Wash, et al, ("Prior Action") an Amended Judgment rendered by the Honorable Edward C. Prado, United States District Judge for the Western District of Texas, San Antonio Division which granted the Motion for Sanctions filed by Nationwide Insurance Company ("Nationwide"), the Plaintiff herein, pursuant to Rule 11 of the Federal Rules of Civil Procedure and assessed against the Plaintiff's counsel therein, Erik C. Moebius, sanctions in the amount of $38,994.87. That Judgment amended the prior Judgment entered on May 24, 1993. The Amended Judgment was entered pursuant to the Memorandum and Recommendation of the Honorable Robert B. O'Connor, United States Magistrate, filed in such case on March 18, 1993 which was accepted by Judge Prado by Order Accepting Magistrate's Recommendations filed May 24, 1993.

The Memorandum and Recommendation of the United States Magistrate is 114 pages in length. It speaks not only to the Motion for Sanctions filed by Nationwide but also to Motions for Summary Judgment and Motions for Sanctions filed by all Defendants therein. It is an exhaustive and thorough report which recommends to the district judge many findings of fact and conclusions of law with regard to the matters which were actually tried before him pursuant to the Order dated November 18, 1992 entered by Judge Prado in such proceeding referring all pretrial matters to Judge O'Connor.

The Plaintiff relies upon those recommended findings which were accepted by Judge Prado to support his Motion for Summary Judgment here. The findings of fact most relevant to

this case are the following:

1. that "...plaintiffs' counsel [Moebius] filed plaintiffs' federal civil rights claims against the private defendants [including Nationwide] without having first conducted a reasonable inquiry into the factual bases for those claims." See Memorandum and Recommendation of United States Magistrate, pp.84-85 attached to Plaintiff Nationwide's Motion for Summary Judgment;

2. that "...plaintiffs' counsel filed plaintiffs' federal civil rights conspiracy claims against the private defendants with full knowledge of, or wanton and reckless disregard for, the absence of any facts to support same and for the purpose of harassing those defendants with having to defend themselves in yet another forum." See Memorandum and Recommendation of United States Magistrate, p.85 attached to Plaintiff Nationwide's Motion for Summary Judgment;

3. that "plaintiffs' counsel filed plaintiffs' original, first amended, and second amended pleadings in this lawsuit without having first made a reasonable inquiry into the factual basis for plaintiffs' federal civil rights claims against the private defendants and for the purpose of harassing the private defendants and increasing those defendants' costs of litigation." See Memorandum and Recommendation of United States Magistrate, p.85 attached to Plaintiff Nationwide's Motion for Summary Judgment;

4. that the record in the case "...demonstrates an abuse of the legal process by plaintiffs' counsel in the filing of plaintiffs' civil rights claims against the private defendants." See Memorandum and Recommendation of United States Magistrate, p.85 attached to Plaintiff Nationwide's Motion for Summary Judgment; and

5. that "plaintiffs' claims against the private defendants were, and are, (1) based neither on existing law nor a good faith argument for the extension, modification or reversal of existing law, (2) based upon inadequate legal support, and (3) motivated by improper purpose." See Memorandum and Recommendation of United States Magistrate, p.86-87 attached to Plaintiff Nationwide's Motion for Summary Judgment.

Although not restated herein in full due to the length of the documents, this Court incorporates by reference herein all of the findings of fact proposed by Judge O'Connor in his Memorandum and Recommendation and accepted by Judge Prado insofar as they relate to Wash's Motion for Sanctions which was one of the pending motions determined thereby.

Issues

1. Applicability of collateral estoppel?

2. Do the subsidiary facts determined in the Prior Action compel a determination of nondischargeability of the Rule 11 sanctions awarded to the Plaintiff against the Defendant in the Prior Action under § 523(a)(6)?

3. Under § 523(a)(7)?

Conclusions of Law and Analysis

1. Collateral Estoppel. Clearly the doctrine of collateral estoppel may be applied in dischargeability actions. Matter of Shuler, 722 F.2d 1253 (5th Cir. 1984), cert. denied, 469 U.S. 817 (1984). In order to determine whether to apply collateral estoppel in any particular case, the Bankruptcy Court must have before it sufficient portions of the prior record in order to be able to determine that the subsidiary facts were actually litigated and necessarily determined by the prior court. In re Nix, 92 B.R. 164 (Bankr. N.D. Tex. 1988). "If the prior record suffi-

ciently established the subsidiary facts on which the judgment was based, the court then independently determines whether these subsidiary facts establish the elements of nondischargeability as defined by federal bankruptcy law." Id.

In the present case, we have before us the very detailed and complete 114-page Memorandum and Recommendation of the United States Magistrate, the 17-page Order Accepting Magistrate's Recommendations of the District Judge, and the ultimate Amended Judgment. An examination of these documents clearly reveals very detailed subsidiary facts which were found by that Court, which support that Court's ultimate ruling in the Prior Action, and which were viewed by it as necessary to its ruling. These factual findings are in sufficient detail that this Court can determine whether they also establish the independent elements of nondischargeability under the § 523(a) causes of action which are at issue in this adversary proceeding.

Further, "Collateral estoppel may be applied to a trial court finding even while the judgment is pending on appeal." In re Nix, supra at p. 167, citing Southern Pacific Communications Co. v. American Telephone & Telegraph, 740 F.2d 1011 (D.C. Cir. 1984). In this case, Moebius alleges that he effectively appealed Judge Prado's Amended Order. Plaintiff disputes that. Regardless, the existence of an appeal does not prevent the rendering of a decision in this matter.

2. Nondischargeability Under § 523(a)(6). In order to apply collateral estoppel in this case, the factual issues under §523(a)(6) sought to be precluded must be identical to those determined in the prior action, they must have been actually litigated, and the determination of these issues must have been necessary to the resulting judgment. Shuler, supra. at p. 1256, n. 2 [citing White v. World Finance of Meridian, Inc., 653 F.2d 147, 151 (5th Cir. 1981)].

The issue in the Prior Action was whether Moebius violated Rule 11 of the Federal Rules of Civil Procedure which provides

in relevant part as follows:

> The signature of an attorney ... constitutes a certificate by the signer that the signer has read the pleading ...; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass ...". Rule 11 F.R.C.P.

The District Court found among other things (1) that Moebius had filed his client's federal civil rights claims against Nationwide without having first conducted reasonable inquiry into the factual basis of those claims and with full knowledge of, or wanton and reckless disregard to, the absence of any facts to support the same and for the purpose of harassing those defendants with having to defend themselves in yet another forum, (2) that Moebius filed plaintiffs' original, first amended, and second amended pleadings in this lawsuit without having first made a reasonable inquiry into the factual basis for plaintiffs' federal civil rights claims against the private defendants and for the purpose of harassing the private defendants and increasing the defendants' cost of litigation, (3) that the record demonstrates an abuse of the legal process by plaintiffs' counsel in the filing of plaintiffs' federal civil rights claims against the private defendants, and (4) that the plaintiffs' claims which were brought by Moebius against Nationwide were based neither upon existing law nor a good faith argument for the extension, modification, or reversal of existing law, were based upon inadequate legal support, and were motivated by improper purpose.

Also contained as part of Judge O'Connor's recommended findings accepted by Judge Prado is the following:

> Seldom, if ever, before has this Court been witness

> to a civil lawsuit in which a party has asserted more unsubstantiated, scurrilous allegations of perfidy on the part of a group of defendants that has been presented by plaintiffs herein in their Second Amended Petition [sic]. The plaintiffs allege that the private defendants bribed and conspired with no less than two separate state district court Judges for the purpose of depriving the plaintiffs of fair judicial proceedings. Such allegations necessarily draw into question the integrity of the individual defendants, two of whom are licensed attorneys, the two state court judges with whom the private defendants allegedly conspired, and the judicial process itself. Yet, despite several efforts by this Court to prod the plaintiffs into providing, if not proper summary judgment evidence supporting their broad-ranging allegations of corrupt activities on the part of the defendants, then at least fact-specific allegations supporting same, plaintiffs have furnished this Court with not even a scintilla of evidence establishing that any of the private defendants ever bribed or conspired with either of the two state district Judges mentioned plaintiffs' Second Amended Petition [sic]. Innuendo is no substitute for fact; stridency no substitute for evidence. Inferences of a civil rights conspiracy can only be drawn from legally admissible evidence, of which the record in this case is totally devoid. The plaintiffs' counsel's action in filing plaintiffs' Second Amended Petition [sic] in this lawsuit constituted an abuse of the legal process rarely approached in the annals of this Court."

See Memorandum and Recommendation of United States Magistrate, pp.87-88.

After hearing the Plaintiffs objections to the United States Magistrate's Memorandum and Recommendation, Judge Prado

overruled those objections and accepted the Recommendation.

So, the District Court in the Prior Action has found as a matter of fact that with regard to the Plaintiff Nationwide, the Defendant Moebius caused pleadings to be filed "for the purpose of harassing", "without having first conducted a reasonable inquiry into the factual basis of those claims", "with full knowledge of, or wanton and reckless disregard for, the absence of any facts to support the same", which conduct "demonstrates an abuse of legal process by" Moebius and that all of such action was "motivated by improper purpose".

Were the foregoing subsidiary facts actually litigated? There can be no doubt about it. They clearly were litigated, without question.

Were they necessary to be determined for the decision to be rendered in the prior Federal Court matter? Absolutely. The foregoing quoted findings are virtually identical to the provisions of Rule 11 which one must prove in order to establish a violation of that rule.

So the question becomes whether the subsidiary facts found in the prior Federal Court action are identical to those in this action that are required to be proven in order to establish a violation of § 523 (a)(6). The answer is an unqualified "yes, they are."

In the Fifth Circuit "willful" as used in § 523(a)(6) means "intentional" and the term "malicious" means "without just cause or excuse". Seven Elves, Inc. v. Eskenazi, 704 F.2d 241 (5th Cir. 1983).

> "Willful" as used in § 523(a)(6), means deliberate or intentional. "Malicious", as used, means in conscious disregard of one's duties, or without just cause or excuse, and does not require ill will or specific intent to do harm.

Norton v. Dean (In re Dean), 79 B.R. 659, 662 (Bankr. N.D. Tex. 1987).

Do the findings of fact in the Prior Action establish that Moebius' action was intentional? Clearly they do. Moebius, as attorney for the plaintiff in the Prior Action, caused the filing of his client's alleged federal civil rights conspiracy claims as contained in the plaintiff's original, first amended, and second amended pleadings. Moebius' position that the Prior Action fails to establish that he intended to injure Nationwide is not responsive as the inquiry is not whether there was an "intention to injure" but instead whether the act taken which resulted in the injury was intentional. Here, without question, the Prior Action establishes that Moebius' actions which resulted in the injury to Nationwide were wilfully taken; that is, he intended to take the actions he took and those actions resulted in the complained of injury.

Was Moebius' conduct malicious? Neither ill will or specific intent to do harm is required for a finding of malicious to be mandated under § 523 (a)(6). Here the Prior Action has determined that Moebius' action was taken "for the purpose of harassing" Nationwide among others, that his action was "motivated by an improper purpose", and that it amounted to "an abuse of the legal process". Clearly, those findings are equal to and support a determination in this matter that Moebius' conduct was "without just cause or excuse" or in "conscious disregard of his duties" as a practicing attorney under Rule 11.

The subsidiary facts upon which the Amended Judgment was entered in the Prior Action having been actually litigated, having been necessary to the determination of the resulting judgment therein, and being identical to the facts which Plaintiff herein must prove by a preponderance of the evidence, Defendant is collaterally estopped from re-litigating them. Judgment is mandated for the Plaintiff determining that the Amended Judgment against Moebius in the amount of

$15,403.62 entered in the Prior Action in favor of the Plaintiff is not dischargeable.

3. Dischargeability Under § 523(a)(7). To the extent that the Amended Judgment represents "a fine, penalty or forfeiture ... payable to and for the benefit of governmental unit, and is not compensation for actual pecuniary loss, ...", it is nondischargeable. 11 U.S.C. § 523(a)(7).

Clearly, the central purpose of Rule 11 is to deter frivolous lawsuits, Thomas v. Capital Security Services, Inc., 836 F.2d 866, 879 (5th Cir. 1988) (en banc). "Sanctions also insure, to a large degree, that victims of frivolous lawsuits do not pay the expensive legal fees associated with defending such lawsuit ..." Id. citing United Food & Commercial Workers v. Armour and Co., 106 F.R.D. 345, 349 (1985). "However, we would caution that '[w]hether sanctions are viewed as a form of cost-shifting, compensating opposing parties injured by vexatious or frivolous litigation forbidden by Rule 11, or as a form of punishment imposed on those who violate the Rule, the imposition of sanctions pursuant to Rule 11 is meant to deter attorneys from violating the Rule. Donalson, 815 F.2d at 1556 (emphasis added)." Id. at 877.

This Court has found three different results by courts in applying § 523(a)(7) in cases such as this.

One bankruptcy court, in deciding that Rule 11 sanctions imposed upon a debtor in a Chapter 11 case for actions taken therein are not discharged in the Chapter 7 case to which the debtor converted, stated what seems to be a "per se" rule:

> Can a Rule 9011 sanction be discharged? This court must answer that question with a resounding 'NO'! To allow the offending party to discharge a Rule 9011 sanctions would totally defeat, destroy, and emasculate its purpose.

In re McIntrye, 96 B.R. 70 (Bankr. S.D. Miss. 1989).

Other courts have determined that the "plain meaning" of §523(a)(7) compels a ruling of nondischargeability only if the award is both payable to and for the benefit of a governmental unit. In re Strutz, 154 B.R. 508 (Bankr. N.D.Ind. 1993). In re Ellwanger, 105 B.R. 551, 555-6 (9th Cir. BAP 1989) ("Congress specifically created an exception to discharge for noncompensatory damages. In establishing the exception Congress clearly determined not to allow nongovernmental entities to seek to have penalties and other noncompensatory determined nondischargeable."). Another bankruptcy court determined that costs awarded by the Idaho Supreme Court in favor of the Idaho State Bar in disciplinary proceedings against the debtor/lawyer were nondischargeable under § 523(a)(7) because the Idaho State Bar was a governmental unit. In re Williams, 158 B.R. 488 (Bankr. D. Idaho 1993). See also In re Corbly, 61 B.R. 851 (Bankr. D.S.D. 1986), on reconsideration, 149 B.R. 125 (Bankr. D.S.D. 1992) (Portion of contempt judgment payable to a municipality which was determined to be a fine payable to and for the benefit of a governmental unit was nondischargeable since it was noncompensatory to nature).

Still other courts have held similar judicial fines or penalties nondischargeable even though payable to a private litigant. In re Winn, 92 B.R. 938 (Bankr. M.D. Fla. 1988) (A contempt judgment payable to the opposing party was determined not to be compensation for actual pecuniary loss, even though civil in nature, and to be for the purpose of vindicating the dignity and authority of the court and, therefore, for the benefit of a governmental unit.). In re Klein, 31 B.R. 947 (Bankr. Colo. 1983) (Contempt fine for failure to deliver children in accordance with custody order was a penalty imposed to uphold the dignity of the court and was noncompensatory in nature; therefore, it was nondischargeable even though payable directly to the opposing party.) In re Marini, 28 B.R. 262 (Bankr. E.D.N.H. 1983) (A fine for violation of a temporary restraining order construed to be primarily to uphold the dig-

nity of the court even though payable directly to the opposing party and therefore nondischargeable.)

The language of § 523(a)(7) is clear and unambiguous. It holds a debt nondischargeable to the extent it is a "fine, penalty, ... payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, ...". (emphasis added). The Supreme Court of the United States has told us bankruptcy judges simply to look at the "plain meaning" of the statute. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989).

> As a [sic] least one other bankruptcy court has put it,
>
> > This court must respectfully and reluctantly disagree. Although there are certainly excellent policy reasons for the 'totality of the circumstances' inquiry adopted by Marini and its progeny, that type of analysis is demonstrably at odds with the plain meaning of the statute.

In re Strutz, supra at 510. The language of § 523(a)(7) is clear. In order to be nondischargeable the fine or penalty must be "payable to and for the benefit of a governmental unit". Further, it must not be compensatory in nature. In this case, the Rule 11 sanctions are not payable to a governmental unit but to a private litigant. Further, they are clearly compensatory in nature as they represent attorney's fees incurred by Nationwide in the defense of the frivolous action brought by Moebius. The fact that one of the purposes for which the sanction was awarded was to uphold the dignity of the legal process in federal court as well as the court itself does not allow this Court to dispense with the other stated requirements of § 523(a)(7). Accordingly, the debt in question is dischargeable under § 523(a)(7).

An order of even date with this Memorandum Opinion will be entered pursuant to Rule 59, F.R.C.P.

DATED: April 7, 1994.

/s/ F.R. Monroe
FRANK R. MONROE
United States Bankruptcy Judge